79-1989

Supreme Court, U.S.
FILED
SEP 8 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CITIZENS PARTY, et al.,

Appellants,

v.

A. JAMES MANCHIN,
Secretary of State of
West Virginia,

Appellee.

MOTION TO DISMISS

CHAUNCEY H. BROWNING
Attorney General

GREGORY W. BAILEY
Deputy Attorney
General

LAWRENCE R. FRAIL
Assistant Attorney
General

COUNSEL FOR APPELLEE

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CITIZENS PARTY, et al.,

Appellants,

v.

A. JAMES MANCHIN,
Secretary of State of
West Virginia,

Appellee.

MOTION TO DISMISS

CHAUNCEY H. BROWNING
Attorney General

GREGORY W. BAILEY
Deputy Attorney
General

LAWRENCE R. FRAIL
Assistant Attorney
General

COUNSEL FOR APPELLEE

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CITIZENS PARTY, et al.,

Appellants,

v.

A. JAMES MANCHIN,
Secretary of State of
West Virginia,

Appellee.

MOTION TO DISMISS

Comes now the appellee, A. James Manchin, Secretary of State of the State of West Virginia, by counsel, and moves that the above-styled action be dismissed for the following reasons:

I.

APPELLANTS SHOULD NOT BE GRANTED AUTOMATIC BALLOT ACCESS IN WEST VIRGINIA WITHOUT A SHOWING OF POPULAR SUPPORT.

As was discussed in Appellee's Motion in Opposition to Appellant's Motion to Expedite and for Emergency Relief, it is clear that appellants have not acted in good faith in the course of this litigation. The record in this case, from its very inception in Kanawha County Circuit Court (wherein injunctive relief was denied the West Virginia Libertarian Party, in part on the basis of the doctrine of laches), reflects an utter absence of meaningful effort by appellants to accomplish ballot access under and within the laws of the State of West Virginia as they pertain to elections. Rather, a pattern of "trial by ambush" and consecutive bids for extraordinary relief, have characterized the appellants' course in this matter. (See, Appellee's Motion in Opposition to Issuance of Writ of Injunction.)

Indeed, if the appellants had taken action to attempt to comply with the law before and after the changes therein as instituted by the West Virginia Supreme Court of Appeals by its order of May 22, 1980, appellee contends that appellants could have appeared on the ballot in West Virginia. As is shown by the access to the West Virginia ballot as attained by the West Virginia Libertarian Party Candidates and John Anderson, the requirements in this State were not and are not now insurmountable, nor unduly burdensome so as to deny ballot access to independent or third party candidates. The failure of appellants to attain ballot access is born of their own inaction and it would be most

unfortunate to simply hand over ballot access to persons who exerted no effort to make any showing of public support. Indeed, such automatic placement would be the only conceivably workable method of granting relief to appellants at this late date.

However, even such placement on the ballot by order of this Court would be, as a practical matter, unworkable and burdensome to the State. The primaries are long past, the candidacies at this time have been firmly established, and the campaign season is rapidly drawing to its conclusion. To alter and refashion the ballots at this time would be a monumental and confused undertaking. The appellee requests that this Court recognize the impracticalities involved in granting appellants' last minute demands and thus requests that the relief sought by appellants be denied.

II.

THE FORFEITURE OF NOMINATING CERTIFICATE SIGNER'S VOTE IN THE PRIMARY IS CONSTITUTIONALLY PERMISSIBLE.

This Honorable Court has addressed this issue, saying:

> "[W]e have no doubt about the validity of disqualifying from signing an independent candidate's petition all those registered voters who

> voted in a partisan ballot in the primary, although they did not vote for the office sought by the independent. * * *" (Emphasis supplied.) Storer v. Brown, 415 U.S. 724 at 740-741, 39 L. Ed. 2d 714, 94 S. Ct. 1274 (1974).

The West Virginia Supreme Court of Appeals has clearly upheld the provision that primary voters are precluded from signing a nominating certificate. In State ex rel. Daily Gazette Co. v. Bailey, 152 W. Va. 521, 164 S.E.2d 414 (1968), it was held that such a signing amounts to a vote by ballot:

> "[O]ne who signs such certificate is precluded from casting a further vote in the primary election." 164 S.E.2d at 418.

In American Party of Texas v. White, 415 U.S. 767, 39 L. Ed. 2d 744, 94 S. Ct. 1296 (1974), this Honorable Court clearly held that a state is not constitutionally bound to allow a voter to vote in a party primary and to sign a nominating petition of another party. 415 U.S. at 785. The distinctions drawn by appellants between White and the instant situation are hardly compelling. The appellants in White could indeed collect signatures before and after the primary election. However, the requirements under the Texas law discussed in White, namely, the requirements of signatures equal to three to five percent

of the last vote cast, must be contrasted to the West Virginia requirement of gathering signatures equal to only one percent of the vote cast in the last election. Gathering such a tiny percentage of signatures in West Virginia prior to the primary election would hardly be a Herculean task if petitioners had made any meaningful effort at all to collect such signatures. There is nothing in the record to suggest that appellants could not have met such a requirement.

Additionally, as a practical matter, voters who had signed appellants' certificates could not be prevented from again voting for the office for which such signatures had been offered, once they enter a voting machine. Therefore, in order to uphold the integrity of the balloting process, the law as it is presently framed must be upheld.

III.

WEST VIRGINIA'S FILING FEE SYSTEM FOR POLITICAL CANDIDATES PROMOTES A VARIETY OF STATE INTERESTS, AND IS THEREFORE CONSTITUTIONALLY SOUND.

This Honorable Court observed as follows in Lubin v. Panish, 415 U.S. 709, 39 L. Ed. 2d 702, 94 S. Ct. 1315 (1974):

"In Bullock v Carter, 405 US 134, 31 L Ed 2d 92, 92

S Ct 840 (1972), we recognized that the State's interest in keeping its ballots within manageable, understandable limits is of the highest order. Id., at 144-145, 31 L Ed 2d 92. The role of the primary election process in California is underscored by its importance as a component of the total electoral process and its special function to assure that fragmentation of voter choice is minimized. That function is served, not frustrated, by a procedure that tends to regulate the filing of frivolous candidates. A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence would tend to impede the electoral process. That no device can be conjured to eliminate every frivolous candidacy does not undermine the state's effort to eliminate as many such as possible.

"That 'laundry list' ballots discourage voter participation and confuse and frustrate those who do

> participate is too obvious to call for extended discussion. The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not. Rational results within the framework of our system are not likely to be reached if the ballot for a single office must list a dozen or more aspirants who are relatively unknown or have no prospects of success." 415 U.S. at 715, 716.

Obviously, there are numerous legitimate reasons for limiting the size of the ballot, and for restricting access thereto.

Appellants apparently argue the evils of the very existence of a fee system, regardless of its application. In this regard, appellants rely on cases which apply to indigent candidates. However, the West Virginia Supreme Court of Appeals, in its order of May 22, 1980, struck down the filing fee as it applies to indigents. Thus, appellants apparently are simply unhappy about having to pay the fees, period, and are proceeding on the notion that the fee system in West Virginia is patently unconstitutional as to all candidates.

The appellee argues that such fees are not unconstitutional, but are rationally related to the furtherance of the State's interest in ballot regulation, assuring that the winner is the choice of at least a strong plurality of voters while avoiding run-off elections, limiting the ballot to serious candidates and defraying expenses. Indeed, since Lubin, supra, the validity of filing fees has been robustly upheld. Fees of up to five percent of the annual salary of the office sought have found approval in Adams v. Askew, 511 F.2d 700 (5th Cir. 1975). Adams provides an excellent discussion of the vitality of filing fees, and holds that voters' rights are not infringed where a candidate chooses not to run because he is unwilling to comply with reasonable state requirements. The State alleges that such a deliberate refusal is at issue herein. Adams further holds that, unlike the rights of voters, the right of candidacy is not accorded a fundamental status for purpose of equal protection analysis of restrictions thereon.

Indeed, appellee observes that this Honorable Court has shifted from time to time in its requirement as to the level of analysis to be applied to these cases. The appellee urges that the payment of fees in order to secure one's candidacy need not be viewed in terms of "compelling state interest," but that even if it is so viewed herein, the appellee believes that its interests are sufficiently compelling, particularly

in view of the inaction and deliberate defiance of the appellants herein, to withstand such scrutiny. The appellants have given this Court no reasons requiring that they be treated differently from other office seekers as to the payment and filing of fees. Nor do they offer any evidence of harm coming to them on the basis of the West Virginia requirement that said fees be paid before canvassing begins. If the candidate can afford the fees, he should be required to pay them at the outset to offset administrative costs attendant to elections. At any rate, the order in which such payment is made by nonindigents is surely a matter which goes beyond the proper scope of review herein. It is a nonconstitutional "housekeeping" matter.

IV.

THE REQUIREMENT THAT CANVASSERS MUST SECURE CREDENTIALS BEFORE SOLICITING CERTIFICATE SIGNATURES IS NOT AN UNCONSTITUTIONAL LICENSING SCHEME.

That canvassers must secure credentials in order to solicit certificate signatures is utterly valid and essential to assure that fraud and irregularities do not occur in the collecting of names to promote ballot placement. Appellants would have this Court permit supporters of independent candidates to anonymously stalk about collecting signatures. The persons approached deserve to know who

the canvasser is and whom he or she actually represents. This can best be accomplished by providing the canvasser with credentials indicating his or her identity and function. Of course, the potential for irregularities is greatly diminished when there exists a record of where the signatures turned in are coming from.

No great burden is placed on canvassers by having to enter the county clerk's office and applying for credentials. There is, of course, no charge therefor, and credentials are readily afforded upon application therefor.

The appellee notes that in the limited scope of the cases in this area, no statutory provision such as that complained of has been directly addressed. The State takes the posture that the cases cited by appellants are as a whole actually supportive of the State's position, particularly Hynes v. Mayor of Oradell, 425 U.S. 610, 48 L. Ed. 2d 243, 96 S. Ct. 1755 (1976). The provision complained of herein has the valid purposes of protecting the public and the electoral process, and is not simply designed to compel disclosure of the identity of canvassers. The concern about retaining canvassers' anonymity surely cannot overcome the genuine need for disclosure by those soliciting signatures.

CONCLUSION

The appellee would remind this Court that there is always to be found, if one searches sufficiently long and hard for it, a less restrictive or burdensome alternative. Rather, the analysis should focus on whether one exercising reasonable diligence can appear on the ballot. Storer v. Brown, supra. The appellee believes that no candidate making such a reasonable effort to accumulate signatures and funds need be eliminated from the ballot under current West Virginia law. The United States Supreme Court in Mandel v. Bradley, 432 U.S. 173, 53 L. Ed. 2d 199, 97 S. Ct. 2238 (1977), looked to factual and practical considerations in reviewing ballot access requirements. This Court is requested to do the same now.

Additionally, appellee respectfully submits that the provisions of the West Virginia Code attacked herein need not and should not be declared unconstitutional on the basis of the outcries of the appellants, political groups who have failed to ignite the public's imagination, and therefore in desperation seek last-minute action by this Court in order to secure their places on the ballot.

Respectfully submitted,

A. JAMES MANCHIN,
Secretary of State

By Counsel

CHAUNCEY H. BROWNING
Attorney General

GREGORY W. BAILEY
Deputy Attorney General

LAWRENCE R. FRAIL
Assistant Attorney General
State Capitol, Room 26-E
Charleston, West Virginia 25305

Counsel for Appellee

CERTIFICATE OF SERVICE

I, Gregory W. Bailey, one of counsel for the appellee and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 9TH day of October, 1980, I served three (3) copies of the foregoing Motion to Dismiss on the appellants by depositing same in a United States mailbox, with postage prepaid, addressed to counsel of record for the appellants Robert M. Bastress, Box 1295, Morgantown, West Virginia 26505. I further certify that all parties required to be served have been served.

Gregory W. Bailey

GREGORY W. BAILEY